Kahlong Jewellery Sdn Bhd v Lee Jinn Loong

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCvC-147–10 OF 2022
WONG MEE LING JC
23 MAY 2024

Civil Procedure — Discovery — Application for order for discovery, production and inspection of documents — Application by plaintiff under O 24 r 11 of Rules of Court 2012 for defendant to produce three acknowledgement letters and to send the same to Department of Chemistry Malaysia in Petaling Jaya, Selangor ('JKM') to do comparison — Whether plaintiff's application should be allowed — Whether plaintiff's application for defendant to bear costs of application could be allowed — Whether decision of court for application under O 24 r 11 of Rules of Court 2012 appealable — Courts of Judicature Act 1964 s 3 — Rules of Court 2012 O 24 rr 11, 12 & 13

The dispute herein was in relation to the service of the memorandum of appearance ('MOA') by the defendant to the plaintiff. Initially, the defendant had filed encl 19 seeking the court's order that such service was a proper and effective service. There were three cover letters ('letters 1D, 2D and 3D' or collectively referred to as 'the three letters') enclosed together with the MOA which served as an acknowledgement copy during the service of the MOA. However, the plaintiff denied acknowledging letters 1D and 3D and argued that the said letters were forged. This was because the round stamp on the said letters were different from the original acknowledgement in letter 2D. The plaintiff then filed the present application ('encl 55') under O 24 r 11 of the Rules of Court 2012 ('the ROC'), inter alia, to seek the court's order for the defendant to produce the three letters and to send the letters to Department of Chemistry Malaysia in Petaling Jaya, Selangor ('JKM') to do comparison ('prayer 1'). Aside from prayer 1, there were also other prayers sought by the plaintiff related to the fabrication of the round stamp in letter 1D and 3D by the defendant's solicitor as well as prayer 6 seeking for the costs to be paid by the defendant. The issues arose were: (a) whether the plaintiff's application, in particular for the court's order to send the letters to JKM, and that the defendant should bear the costs of the application could be allowed; and (b) whether the decision of the court was appealable.

Held, allowing prayer 1 of encl 55 and dismissing prayers 2–6 with costs in the cause:

(1) Order 24 r 12 of the ROC empowered the court to order the production of any document in the defendant's possession, custody or power relating to any matter in question in the cause or matter that fell with the descriptions in paras (a) to (c). Under O 24 r 13 of the ROC, the court may make the order if the court was of the opinion that the order was necessary either for disposing fairly of the cause or matter or for saving costs. According to the principle laid down in the case of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96, the court opined that encl 55 was related to encl 19 and the three letters were in the possession of the defendant. Therefore, the documents were relevant to determine the factual issues in dispute, namely whether the service of the MOA to the plaintiff's solicitor was proper and within the stipulated time. Further, the defendant did not object to prayer 1. The court therefore allowed prayer 1. In this regard, the court had reiterated during the hearing of encl 55 that the plaintiff was at liberty to send the three letters for the examination by JKM to determine the veracity of the documents and to prove their allegations against the defendant (see paras 12, 15–16 & 19).

(2) The court disallowed prayers 2 to 6 because it did not fall within the ambit of O 24 r 11 of the ROC sought by the plaintiff vide encl 55. The court found that prayer 6, which sought for the costs to be paid by the defendant with the interest of 5%pa from the date of the court order till the full settlement, was baseless and without proof. Further, there was no evidence produced by the plaintiff that the round stamp on letters 1D and 3D had been fabricated by the defendant's solicitor (see paras 17 & 21).

(3) In the present case, the decision was made during the course of application for the discovery, it was just a ruling and it did not finally dispose of the rights of the parties as there was no final determination of the matter and the determination of the alleged fabrication of round stamp by the defendant's solicitor which may lead to the rejection of MOA and subsequently the defence and counter claim filed by the defendant. Therefore, it was not a 'decision' within the meaning of s 3 of the Courts of Judicature Act 1964. Hence, according to the principles laid down in the case of *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1, the decision was non-appealable. Nonetheless, since the notice of appeal had been filed, the court left the matter to be determined by the Court of Appeal (see paras 25–26).

[Bahasa Malaysia summary

Pertikaian di sini adalah berhubung dengan penyampaian memorandum kehadiran ('MOA') oleh defendan kepada plaintif. Pada mulanya, defendan

telah memfailkan lampiran 19 bagi memohon perintah mahkamah bahawa penyampaian tersebut adalah penyampaian yang teratur dan berkesan. Terdapat tiga surat iringan ('surat 1D, 2D dan 3D' atau secara kolektif dirujuk sebagai 'tiga surat tersebut') disertakan bersama MOA tersebut yang berfungsi sebagai salinan pengakuan terima semasa penyampaian MOA tersebut. Bagaimanapun, plaintif menafikan telah mengaku terima surat 1D dan surat 3D dan berhujah bahawa surat-surat tersebut adalah palsu. Ini kerana cop bulat pada surat-surat tersebut adalah berbeza daripada pengakuan terima asal dalam surat 2D. Plaintif kemudian memfailkan permohonan semasa ('lampiran 55') di bawah A 24 k 11 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'), antara lain, untuk mendapatkan perintah mahkamah supaya defendan mengemukakan tiga surat tersebut dan menghantar surat-surat tersebut kepada Jabatan Kimia Malaysia di Petaling Jaya, Selangor ('JKM') untuk membuat perbandingan ('permohonan 1'). Selain permohonan 1, terdapat juga permohonan-permohonan lain yang dipohon oleh plaintif berkaitan dengan pemalsuan cop bulat dalam surat 1D dan surat 3D oleh peguam cara defendan serta permohonan 6 yang memohon supaya kos permohonan dibayar oleh defendan. Isu-isu yang timbul ialah: (a) sama ada permohonan plaintif, khususnya untuk perintah mahkamah menghantar surat-surat tersebut kepada JKM, dan defendan harus menanggung kos permohonan tersebut boleh dibenarkan; dan (b) sama ada keputusan mahkamah boleh dirayu.

Diputuskan, membenarkan permohonan 1 dan menolak permohonan 2–6 dengan kos di dalam kausa:

(1) Aturan 24 k 12 KKM 2012 memberi kuasa kepada mahkamah untuk memerintahkan pengemukaan apa-apa dokumen dalam milikan, jagaan atau kuasa defendan yang berhubungan dengan apa-apa perkara yang dalam persoalan dalam kausa atau perkara yang termasuk dalam perihalan dalam perenggan (a) hingga (c). Di bawah A 24 k 13 KKM 2012, mahkamah boleh membuat perintah tersebut jika mahkamah berpendapat bahawa perintah tersebut perlu sama ada untuk menyelesaikan secara adil kausa atau perkara tersebut atau untuk menjimatkan kos. Mengikut prinsip yang ditetapkan dalam kes *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96, mahkamah berpendapat bahawa lampiran 55 adalah berkaitan dengan lampiran 19 dan ketiga-tiga surat tersebut adalah dalam milikan defendan. Oleh itu, dokumen-dokumen tersebut adalah relevan untuk menentukan persoalan-persoalan fakta yang dipertikaikan, iaitu sama ada penyampaian MOA tersebut kepada peguamcara plaintif adalah teratur dan dalam masa yang ditetapkan. Selain itu, defendan tidak membantah permohonan 1. Oleh itu mahkamah membenarkan permohonan 1. Sehubungan itu, mahkamah telah mengulangi semasa perbicaraan lampiran 55 bahawa plaintif bebas menghantar tiga surat

tersebut untuk pemeriksaan oleh JKM untuk menentukan ketepatan dokumen-dokumen tersebut dan untuk membuktikan dakwaan-dakwaan mereka terhadap defendan (lihat perenggan 12, 15–16 & 19).

(2) Mahkamah tidak membenarkan permohonan 2 hingga 6 kerana ia tidak termasuk dalam ruang lingkup A 24 k 11 KKM 2012 yang dipohon oleh plaintif melalui lampiran 55. Mahkamah mendapati bahawa permohonan 6, yang meminta kos yang perlu dibayar oleh defendan dengan faedah 5% setahun dari tarikh perintah mahkamah sehingga penyelesaian penuh, adalah tidak berasas dan tanpa bukti. Selanjutnya, tiada keterangan yang dikemukakan oleh plaintif bahawa cop bulat pada surat 1D dan surat 3D telah dipalsukan oleh peguam cara defendan (lihat perenggan 17 & 21).

(3) Dalam kes semasa, keputusan tersebut dibuat semasa permohonan untuk penzahiran, ia hanya satu ketetapan dan ia tidak melupuskan hak pihak-pihak secara muktamad kerana tiada penentuan muktamad mengenai perkara tersebut dan penentuan dakwaan pemalsuan cop bulat oleh peguam cara defendan yang boleh menyebabkan penolakan MOA dan seterusnya pembelaan dan tuntutan balas yang difailkan oleh defendan. Oleh itu, ia bukanlah satu 'keputusan' dalam pengertian s 3 Akta Mahkamah Kehakiman 1964. Oleh itu, mengikut prinsip yang ditetapkan dalam kes *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1, keputusan tersebut tidak boleh dirayu. Namun begitu, memandangkan notis rayuan telah difailkan, mahkamah membiarkan perkara tersebut untuk ditentukan oleh Mahkamah Rayuan (lihat perenggan 25–26).]

Cases referred to

Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1, FC (folld)

Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3
Rules of Court 2012 O 24, O 24 rr 11, 12, 13, Form 42

Lim Chin Huat (with Lim Jye Kie) (Lim Chin Huat & Co) for the plaintiff.
Mohd Radzi bin Yatiman (Azlina Ruslan & Co) for the defendant.

Wong Mee Ling JC:

INTRODUCTION

[1] The plaintiff has filed a notice of application (encl 55) under O 24 r 11 of the Rules of the Court 2012 ('the ROC 2012'), amongst others, for the following relief:

(a) original letter from Messrs Azlina Ruslan & Co dated 8 December 2022 for the proof of service containing the seal of Messrs Lim Chin Huat & Co dated 21 December 2022 ('letter 1D') to be produced and examined by the plaintiff;

(b) original letter from Messrs Azlina Ruslan & Co dated 20 December 2022 for the proof of service containing the seal of Messrs Lim Chin Huat & Co dated 21 December 2022 ('letter 2D') to be produced and examined by the plaintiff;

(c) original letter from Messrs Azlina Ruslan & Co dated 8 December 2022 for the proof of service containing the seal of Messrs Lim Chin Huat & Co dated 21 December 2022 ('letter 3D') to be produced and examined by the plaintiff; and

(d) these three letters be sent to Department of Chemistry Malaysia in Petaling Jaya, Selangor ('JKM') for the purpose of comparing documents in determining whether the round stamp in letter 1D and 3D is the same as in letter 2D.

[2] After considering all cause papers and the submissions of the parties, I allowed the plaintiff's application for prayer 1 only with costs in the cause. The rest of the reliefs sought were disallowed.

[3] Below are the grounds of my decision.

BRIEF BACKGROUND

[4] The background facts in this application are gathered from the affidavits and submissions filed by the parties and stated in chronological order.

[5] Enclosure 55 is related to encl 19 filed by the defendant for an order, inter alia, that the service of the memorandum of appearance ('MOA') to the plaintiff by the defendant is a proper and effective service.

[6] The letters referred to as letter 1D (exh 'LJL8' in encl 20), 2D (exh 'LJL8' in encl 20) and 3D (exh 'LJL9' in encl 20) are the cover letters enclosed

together with the MOA, served as an acknowledgement copy during the service of the MOA to the plaintiff's solicitor via post, courier and email.

[7] The plaintiff contended that they did not acknowledge the service of the MOA (letter 1D and 3D), letters 1D and 3D were forged due to the reason that the round stamp on the two (2) letters were different from the original acknowledgement under letter 2D in term of nature and shape. The plaintiff claimed the round stamp on letter 2D is the genuine round stamp of his legal firm.

[8] The defendant on the other hand, contended that they have indeed served the MOA to the plaintiff and the acknowledgements were enclosed as proof of service vide letters 1D, 2D and 3D.

[9] The plaintiff then filed encl 55, inter alia, to seek the order of the court for the defendant to produce these three letters and send them to JKM to do comparison.

ISSUES TO BE DETERMINED

[10] The issues for the determination of this court are as follows:

(a) whether the plaintiff's application, in particular for the court order to send the letters to JKM and whether the defendant should bear the costs of the application can be allowed; and

(b) whether the decision of this court is appealable.

COURT ANALYSIS AND FINDINGS

Whether the plaintiff's application in particular for the court order to send the letters to JKM and whether the defendant should bear the costs of the application can be allowed

[11] Order 24 of the ROC 2012 provides that:

> 10 (1) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 41 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies of that document.
>
> (2) *The party on whom a notice is served under paragraph (1) must, within four days after service of the notice, serve on the party giving the notice, a notice in Form 42 stating a time within seven days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which of the documents he objects to produce.* (Emphasis added.)

[12] Order 24 r 12 of the ROC 2012 empowers the court to order the production of any document in his possession, custody or power relating to any matter in question in the cause or matter that fall with the descriptions in paras (a)–(c). Under O 24 r 13 of the ROC 2012, the court may make the order if of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

[13] In the present case, the defendant has vide a letter dated 28 March 2023 (encl 60) informed the plaintiff that these three letters will be submitted on date of hearing on 19 April 2023. However, the plaintiff contended that the defendant failed to comply with O 24 r 10(2) where the defendant failed to serve the notice in the Form 42 within four days upon receipt of the plaintiff's notice and failed to state a time within seven days after the service thereof at which the documents and if he does not object, the documents can be inspected at a place specified in the notice.

[14] Justice Edgar Joseph Jr in the case of *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581 held that:

> *The essential elements for an order for discovery are threefold, namely first, there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the person against whom the order for discovery is sought* ... As to 'relevance', our Rules of the High Court limit discovery to documents which are 'relevant to' or 'relate' to the factual issues in dispute. (Emphasis added.)

[15] According to the principle laid down in the above case, I am of the view that encl 55 is related to encl 19 and those documents are in the possession of the defendant. Therefore, the documents are relevant to determine the factual issues in dispute, namely whether the service of the MOA to the plaintiff's solicitor is proper and within the stipulated time.

[16] Furthermore, during the hearing of encl 55, the defendants solicitor have stated that the defendant has no objection on prayer 1 of encl 55, to produce all the three documents (letters 1D, 2D and 3D). However, the defendant contended that they could not agree to other prayers and consequential orders applied by the plaintiff. The defendant submitted that they leave it to the plaintiff to take the necessary steps to prove their allegation that letters 1D and 3D were fabricated.

[17] I then allowed encl 55 for prayer 1 since the defendant did not object to prayer 1. However, with regards to prayers 2 to 6, I disallowed those prayers as it does not fall within the ambit of O 24 r 11 of the ROC 2012 sought by the plaintiff vide encl 55. Further, prayer 6 is seeking for the costs to be paid by the defendant with the interest of 5%pa from the date of the court order till the full

settlement, I found it to be baseless and without proof. There is no evidence thus far produced by the plaintiff that the round stamp on letters 1D and 3D have been fabricated by the defendant's solicitor.

[18] I find that the plaintiff's solicitor has informed the Senior Assistant Registrar during the e-review on 21 December 2022 that he needs one month to file a reply and defence to the counterclaim of the defendant. It shows the plaintiff has received the MOA and the defence and counterclaim of the defendant. However, the plaintiff has on 28 March 2023 filed this encl 55 to dispute the service of the MOA by the defendant. The application was filed after the defendant has filed encl 19 and encl 27 (to transfer the proceedings to Muar High Court).

[19] During the hearing of encl 55, I have reiterated that the plaintiff is at liberty to send these three letters for the examination of JKM to determine the veracity of the documents and to prove their allegations against the defendant.

[20] Further, I have informed the plaintiff's solicitor to take the matter up to the Bar Council (Disciplinary Board) if they believe the documents were fabricated by the defendant's solicitor as alleged by the plaintiff. I also direct the plaintiff's solicitor to focus on the merits of the matter than to deviate on the issues of merely technicalities.

[21] I further rule that the allegation of the plaintiff in regards to the fabrication of round stamp on letters 1D and 3D as mere allegations and at the point of delivering this judgment, remained so. It is trite that he who asserts it must prove it.

Whether the decision of this court is appealable

[22] The next issue to be determined is whether the decision of this court is appealable. In this regard, it is wise to refer the decision of the Federal Court decision in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1, inter alia, held that:

> ... (2) *The right to appeal in civil matters under s 67 of the CJA is subject to the definition of 'decision' as found in s 3 of the CJA.* Although s 67(1) of the CJA provides that the Court of Appeal has jurisdiction to determine appeals from any 'judgment' or 'order' of any High Court in civil matters, *it is clear from a plain reading of s 3 of the CJA that a 'decision', 'judgment' or 'order' excludes a ruling made in the course of a trial or hearing that does not finally dispose of the rights of the parties.* Further, the Federal Court in Kempadang's case held that it was clear and unambiguous that the definition of 'decision' as per s 3 was applicable to civil appeals inasmuch as it applied to criminal appeals ... The decision is a clear authority to support the

A proposition that s 67(1) read with s 3 and s 68(1) of the CJA precluded a litigant's right of appeal against a High Court decision in an amendment application made in the course of trial that does not finally dispose of the rights of parties. *Otherwise, it would allow parties in civil matters to circumvent the restrictions imposed by the definition of 'decision' in s 3 of the CJA and thereby appeal against every decision of trial court, which would indisputably delay the administration of justice ...* (Emphasis added.)

[23] Section 3 of the Courts of Judicature Act 1964 (Act 91) provides that:

> *'decision'* means judgment, sentence or order, but *does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;* (Emphasis added.)

[24] Hence, when a decision does not finally dispose of the rights of the parties in the suit, then the decision of the court is non-appealable.

[25] In the present case, the decision is made during the course of application for the discovery, it is just a ruling and it does not finally dispose of the rights of the parties as there is no final determination of the matter and the determination of the alleged fabrication of round stamp by the defendant's solicitor which may lead to the rejection of MOA and subsequently the Defence and counterclaim filed by the defendant. Therefore, it was not a 'decision' within the meaning of s 3 of Act 91. Hence, according to the principles laid down in the case of *Asia Pacific Higher Learning Sdn Bhd*, I am of the view that this decision is non-appealable and ought to be dismissed.

[26] However, since the notice of appealed has been filed, I leave the matter to be determined by the Court of Appeal.

CONCLUSION

[27] Based on the reasons above, I allowed encl 55 for prayer 1 only and disallowed prayers 2–6. I then ordered costs in the cause.

Prayer 1 of encl 55 allowed; prayers 2–6 dismissed with costs in cause.

Reported by Dzulqarnain Ab Fatar